LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 10 197
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term 1971
No. .....

71-633

CITY MESSENGER SERVICE OF HOLLYWOOD, INC., dba CITY MESSENGER AIR EXPRESS and/or C.M.A.X.,
Petitioner,

vs.

CAPITOL RECORDS DISTRIBUTING CORP.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

THOMAS E. RUBBERT,
606 South Olive Street,
Suite 2104,
Los Angeles, Calif. 90014,

GOLDMAN, COLE & PUTNICK,
911 First National Bank Bldg.,
Cincinnati, Ohio 45202,
Attorneys for Petitioner.

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	5
No Federal Statute of Limitations	6
Action by District Court	6
Appeal to United States Court of Appeals	7
The Pleadings	7
The Bill of Lading	9
Reasons for Granting Writ of Certiorari	10
Importance of the Issue	10
Conflict With Federal Policy at Issue	11
Decision Below Conflicts With Settled Law That the Contract Creates the Liability, the Statutory Tariff Determines the Amount of That Liability	14
Court of Appeals' Decision Below in Direct Conflict With All Other Federal Decisions, Including by United States Supreme Court	17
Court of Appeals' Decision Below Exactly Contra to Prior Ruling of Same Court of Appeals	19
Court of Appeals' Ruling Below Contrary to Ohio Law	21
Impact on Industry	24
A Practical Consideration	26
Conclusion	27

INDEX TO APPENDICES

Page

Appendix A. Appeal From the United States District Court for the Southern District of Ohio, Western Division .....App. p. 1

Appendix B. Summary Judgment in Favor of Defendant .....App. p. 4

TABLE OF AUTHORITIES CITED

Cases	Page
Arrasmith v. Pennsylvania Railroad, 410 F. 2d 1311	24
Bartlett-Collins Co. v. Surinam Nav. Co., 381 F. 2d 546	12
Carter v. American Telephone & Telegraph Company, 355 F. 2d 486	18
Charney v. Thomas, 372 F. 2d 97	13
Chicago R.I. & P.R. Co. v. Furniture Forwarders Company of St. Louis, Inc., 420 F. 2d 385	19
Church v. Public Utilities Commission of California, 51 Cal. 2d 399	16
Electrical Fittings Corporation v. Thomas & Betts Company, 3 Fed. 256	24
F.T.C. v. Flotill Products Co., 389 U.S. 179	21
Johnson Motor Transport v. U.S., 149 Fed. Supp. 175	19
Junker v. Midterra Associates, Inc., 49 Fed. 310	24
Louisville & National Railroad v. Central Iron & Coal Co., 265 U.S. 59	18
Louisville & Nashville Railroad v. Dickerson, 191 Fed. 705	19
Mich. Central R.R. v. Mark Owen Co., 256 U.S. 427	18
Pennsylvania Railroad v. Greene, 173 Fed. Supp. 657	19
Potter v. Columbia Broadcasting Systems, Inc., 368 U.S. 464	24
St. Louis, etc. Railroad v. Starbird, 243 U.S. 592	18, 19

Page

Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620 24

Thomas Foods, Inc. v. Pennsylvania Railroad Company, 168 N.E. 2d 612 16

Transcontinental Bus System, Inc. v. CAB, 383 F. 2d 466 12

United States v. Associated Air Transport, Inc., 275 F. 2d 827 .....11, 17, 18

United States v. Louisville & Nashville Railroad, 221 F. 2d 698 .....14, 18, 19, 20

United States v. Mississippi Barge Line Co., 285 F. 2d 381 19

Vanderboom v. Sexton, 422 F. 2d 1233 12

Von der Ahe Van Lines, Inc. v. U.S., 385 F. 2d 999, cert. den. 385 U.S. 837 .....17, 18, 19

J. L. Waring & Company v. The Baltimore & Ohio Railroad Company, 4 Ohio Dec. Rep. 553 21

Statutes

Ohio Revised Code, Sec. 2305.06 .....6, 22

Ohio Revised Code, Sec. 2305.7 .....6, 7, 9

Ohio Revised Code, Sec. 2305.13 7

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 28, Sec. 1651 2

United States Code, Title 49, Sec. 1300 .....5, 6

United States Code, Title 49, Sec. 1373(b) 4

United States Code, Title 49, Sec. 1472(d) 4

IN THE

Supreme Court of the United States

October Term 1971
No. .....

CITY MESSENGER SERVICE OF HOLLYWOOD, INC., dba CITY MESSENGER AIR EXPRESS and/or C.M.A.X.,
Petitioner,

vs.

CAPITOL RECORDS DISTRIBUTING CORP.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

The petitioner, City Messenger Service of Hollywood, Inc., dba City Messenger Air Express and/or C.M.A.X., prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on August 12, 1971.

Opinions Below.

The Opinion of the United States Court of Appeals For the Sixth Circuit, not yet reported, appears in Appendix A, *infra,* at pages 2, 3, 4. The Opinion of the United States District Court, Southern District of Ohio, is also not yet reported and appears at Appendix B, *infra,* pages 5-11. The United States Court of Appeals for the Sixth Circuit affirmed the Judgment of the District Court.

Jurisdiction.

The Order or Judgment of the United States Court of Appeals was decided and filed on August 12, 1971. See Appendix A, *infra,* pages 2, 3, 4. This Petition for Certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, subsection (1) or, in the alternative, under common law certiorari 28 U.S.C. 1651.

Questions Presented.

There is a single, major, issue of first impression presented and a number of closely related issues. The central issue is:

> "In the absence of a Federal Statute of Limitations governing actions by or against an air carrier to recover undercharges from a shipper or the opposite where there has been interstate air transportation of goods, what is the nature of the legal action (is it founded on contract or on the statute fixing the tariff?) and, therefore, what state statute of limitations applies?"

Three closely related issues are also involved:

(1) Whether a bill of lading (Forwarder Airbill) setting forth all of the terms of the agreement between a carrier and a shipper is a written contract for the purpose of statutes of limitation?

(2) Whether an action by an air carrier against a shipper to recover undercharges for the interstate carrying of goods by air is an action based upon the contract (bill of lading) or an action based upon the statute fixing the tariff rate?

(3) Whether the Federal policy of the interstate commerce act requiring enforcement of the lawful tariff rate is served by permitting a shipper of goods by air in interstate commerce to evade paying the Federal tariff rate where a statute of limitations is available allowing action by the carrier against the shipper to recover the Federal tariff rate?

(4) In the absence of a Federal statute of limitations governing actions by or against an air carrier to recover undercharges from the shipper or the opposite in Ohio, does the Ohio Statute of Limitations governing liability created by statute control or that statute of limitations governing written contracts control?

There are two procedural issues presented:

(1) In ruling upon a motion for summary judgment, must a Federal trial court resolve all doubts on an issue against the moving party?

(2) Where there is doubt as to which statute of limitations in Ohio to apply in an action by an air carrier against a shipper to recover undercharges, is it proper for a trial court to resolve that doubt in favor of the moving party on ruling upon a motion for summary judgment?

Statutes Involved.

Within the Interstate Commerce Act the Federal Aviation Act is set forth. Petitioner, CMAX, at the times of interest in this case, was an "air carrier" as that term is used in Chapter 20 of 49 U.S.C. As such, it had filed with the "Board" tariffs applicable to var-

ious of its carriages. Having done so, it was subject to 49 U.S.C. Section 1373 and specifically (b) of that section which provides:

> "No air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares and charges specified in its currently effective tariffs . . ."

Section 1472(d) of Title 49 makes it a criminal offense for any air carrier or ticket agent or employee or representative thereof to willfully grant or give, or cause to be offered, granted, or given, any rebate or other concession in violation of the provisions of the Act, and specifically makes it a criminal offense for any such person to suffer or permit any shipper to obtain transportation or services at less than the published tariff rates.

This Section 49 U.S.C. 1472(d), states:

> "Any air carrier, foreign air carrier, or ticket agent, or any officer, agent, employee or representative thereof, who shall, knowingly and willfully, offer, grant, or give, or cause to be offered, granted, or given, any rebate, or other concession in violation of the provisions of this Act, or who, by any device or means, shall, knowingly and willfully, assist, or shall willingly suffer or permit, any person to obtain transportation or services subject to this Act at less than the rate, fares or charges lawfully in effect, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be subject for each offense of a fine of not less than $100.00 or more than $5,000."

Statement of the Case.

The facts of this case are brief and not unique, but do frame an issue of first impression. This is a contract action brought by an air freight forwarder against a shipper of goods to collect from the shipper undercharges for the interstate carrying of goods by air from California to Ohio by the Air Forwarder on behalf of the shipper. The shipper paid less than the required Federal Tariff rate for the shipping. Now the Air Freight Forwarder seeks to recover the difference between the amount paid by the shipper and the required Federal tariff rate. The action is in Federal Court because it involves interstate commerce and the Interstate Commerce Act. It is a contract action based upon many bills of lading (called "Forwarder Air Bills") which constituted the contracts between the air freight forwarder and the shipper. A specimen is provided in the Appendix for reference, marked "C".

The plaintiff and appellant, City Messenger Service of Hollywood, Inc., dba City Messenger Air Express (hereinafter called CMAX) filed an amended complaint and an answer thereto was filed by the defendant and respondent Capitol Records Distributing Corp., (hereinafter described as Capitol Records). Capitol Records thereupon made a motion for summary judgment on the ground that the action by CMAX was untimely and was barred by one or more of Ohio's statutes of limitation in the absence of any Federal statute of limitations applicable to an action by or against an air carrier to recover undercharges for the opposite. In the Federal Aviation Act (49 U.S.C. §1300 *et seq.*), Congress did not provide for a period of limitations.

No Federal Statute of Limitations.

There is no statute of limitations governing actions by or against an air carrier to recover undercharges or the opposite provided for by the Interstate Commerce Act as it applies to air transportation of goods (Federal Aviation Act 49 U.S.C. §1300 *et seq.*). The action by the air freight forwarder was filed in the United States District Court for the Southern District of Ohio, Western Division. The Motion for Summary Judgment made by the shipper was based upon the statute of limitations in Ohio which provides as follows (Ohio Revised Code, Sec. 2305.7):

> "An action upon a contract not in writing, express or implied, or upon a liability created by statute, other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

The air freight forwarder, CMAX, contended that the action was governed by the Ohio statute of limitations governing written contracts, Ohio Revised Code, Sec. 2305.06, which provided:

> "An action upon a specialty or an agreement, contract, or promise in writing, shall be brought within fifteen years after the cause thereof accrued".

Action by District Court.

The motion for summary judgment of Capitol Records (the shipper) was heard and granted with the District Court below holding that a statute or statutes of limitation in Ohio other than that governing written contracts, controls this case. Thus, the District Court ruled that there was no triable issue between the par-

ties. The District Court found that the action was either governed by the Ohio Statute of Limitations controlling liabilities created by Statute (Ohio Revised Code, Sec. 2305.7) or upon the Ohio Statute of Limitations governing *intrastate* commerce (Ohio Revised Code, Sec. 2305.-13). The court determined for the purpose of its decision that the Bills of Lading (Forwarder Air Bills) were all signed by both parties.

Appeal to United States Court of Appeals.

Following the granting of the motion for summary judgment in favor of Capitol Records, the air freight forwarder, CMAX, appealed to the United States Court of Appeals for the Sixth Circuit. No trial has taken place and the only evidence of record in the matter is a deposition containing a specimen bill of lading (Forwarder Air Bill) offered by the moving party, Capitol Records. The Court of Appeals ruled:

> "In this case we agree with the District Court that the plaintiff is not suing for freight charges described in written contracts, but is suing for the statutory undercharges represented by the difference between the charges set forth in the bills of lading and the amount prescribed by the specified tariff required by law to be filed."

The Pleadings.

Because summary judgment is involved, the District Court and the Court of Appeals were passing upon issues framed by the pleadings. For this reason, a brief analysis of the pleadings is in order as part of the statement of the case.

The capacities of the parties should be noted; CMAX is an air freight forwarder hauling goods by aircraft

for various shippers in interstate commerce. CMAX used different airlines to forward this freight on behalf of the shippers pursuant to the bills of lading giving rise to the relationship between CMAX and the shippers. Capitol Records (the shipper) produced a variety of products largely in the entertainment field, and shipped these products in interstate commerce. The Amended Complaint filed by CMAX alleges that there were contracts of carriage between CMAX and Capitol Records and that between February 5, 1955, and January 8, 1959, CMAX forwarded freight for Capitol Records. The Amended Complaint further alleges that CMAX complied with the Interstate Commerce Act and posted the lawful, Federal tariff rates. CMAX further alleges that the posted tariffs were part of the contract of carriage between CMAX and Capitol Records and that Capitol Records has paid certain portions of the charges for the shipment, but not the lawful, Federal tariff rate.

The Amended Complaint, therefore, seeks to recover the difference between the amount paid by Capitol Records for the services performed by CMAX, and the required Federal tariff rate, some $65,196.04, which is the alleged amount of the undercharges.

The Answer filed by Capitol Records expressly admits that CMAX performed services for Capitol Records between February, 1955, and January 8, 1959, and further admits that shipments were from various business locations to other business locations of Capitol Records in interstate commerce. Capitol Records

expressly admits that each of the shipments were accompanied by a written instrument covering the contractual relationship between CMAX and Capitol Records for every single transaction.

Finally, the Answer of Capitol Records alleges that the action is barred by the Ohio Statute of Limitations governing actions upon a contract not in writing or upon a liability created by statutes (Ohio Revised Code, Sec. 2305.7 as quoted above).

The Bill of Lading.

The Bill of Lading forms the basis of this action by the Air Freight Forwarder against the shipper. As noted, a specimen is provided in the Appendix for reference, and it is a matter of record. All of the terms of the agreement between CMAX and Capitol Records are contained therein and it is this agreement which forms the basis of the lawsuit by CMAX to collect the required Federal tariff rate. Attention is particularly directed to the upper left-hand corner of the specimen wherein the following language is set forth:

> "It is mutually agreed that the goods herein described are accepted in apparent good order (except as noted) for transportation as specified herein, subject to governing rules, classifications and tariffs, in effect as of the date hereof, which are filed in accordance with law. Said rules, classifications and tariffs, copies of which are available for inspection, are hereby incorporated into and made part of this contract."

REASONS FOR GRANTING WRIT OF CERTIORARI.

This is a case of first impression in the Federal Courts. The ruling by the Court of Appeals below is the first ruling in a Federal court upon the major issue raised by the case which, in essence, is: In the absence of a Federal statute of limitations governing actions by or against an air carrier to recover undercharges from a shipper or the opposite where there has been interstate air transportation of goods, what is the nature of the legal action (Is it founded on contract or on the statute creating the tariffs) and, therefore, what statute of limitation governs? Many cases in the State and Federal courts have passed upon this issue in other methods of transportation, including rail, highway, and water, but no Federal case has arisen thus far involving transportation of goods by air in interstate commerce. The ruling of the Court of Appeals below is directly *contra* to the host of decisions of both state and federal courts. including the United States Supreme Court, on exactly the same issue as it relates to other methods of transportation.

Importance of the Issue.

It goes without saying that transportation by air of goods is becoming an increasingly important method of shipping. Most of the airlines in the United States and elsewhere are involved in such air transportation of goods. The dictates of present day commerce require speedy transit of goods for much of industry. All shipping in interstate commerce is, of course, controlled by the Interstate Commerce Act and there are tariffs governing shipment of every description of goods. And there can be only one rate: the tariff rate.

The transportation of goods for all methods of transport is universally handled by the use of bills of lading. These bills of lading invariably include a description of what goods are being shipped, to whom, from whom, and at what rate.

The question presented by this case is one that affects every air freight forwarder, air-carrier and shipper engaged in interstate commerce by air in the United States. It is not a problem existing only between the parties to this lawsuit. The ruling of the Court of Appeals below has fixed the rights and liabilities of every air freight forwarder, air carrier and shipper in the United States and, in fact, that ruling directly conflicts with long-standing and well-established legal principles as well as being in conflict with decisions of the United States Supreme Court. These aspects of the matter are explored below.

Conflict With Federal Policy at Issue.

No one can disagree that the Federal policy in establishing tariffs governing transportation of goods is to enforce the tariff rate which can be the only rate charged for the transportation of the specific goods involved. "The tariff rate is the lawful rate which the carrier *must* exact and that which the shipper *must* pay and no act or omission of the carrier can preclude or estop it from enforcing payment of the full amount of the tariff rate." *United States v. Associated Air Transport, Inc.*, 275 F. 2d 827 (1970). The Federal policy at issue is that the lawful tariff rate shall be paid in every case with no exceptions. No one can argue with the proposition that the Federal policy is that no shipper and no carrier shall *evade* the tariff set by Federal Law. The policy of the law is, of course,

to insure payment to the carrier of the freight charges. *Bartlett-Collins Co. v. Surinam Nav. Co.*, 381 F. 2d 546 (1967). The Federal Aviation Act was enacted to enforce this policy and to halt the granting of preferential and discriminatory rates. *Transcontinental Bus System, Inc. v. CAB*, 383 F. 2d 466 (1967).

In the instant case, there has been interstate transport of goods by air and the shipper has paid a rate less than the required Federal tariff rate. The Court of Appeals below has rendered a decision permitting the shipper to evade the lawful tariff rate, a decision clearly contrary to the Federal policy that every shipper shall pay the lawful Federal tariff rate. Thus, the Federal policy has not been effectuated and, indeed, has been defeated. It would seem that the key to enforcing and effectuating the Federal policy at issue here (that the tariff rate shall be charged) is to utilize that statute of limitation permitting enforcement of the tariff rate in the absence of a Federal Statute of Limitations.

Fortunately, there is considerable Federal authority providing guidance on the subject of selection of an appropriate statute of limitations in this precise situation. Most recently we find *Vanderboom v. Sexton*, 422 F. 2d 1233 (1970), an SEC case. First, that case restates the well established principle that when the Federal Legislative Act is silent as to the statute of limitations applicable to it, the limitation of the forum state is applied. The *Vanderboom* court states:

> "The cases of *International Union of the United Auto Workers v. Hoosier Cardinal Corporation*, 383 U.S. 696 (1966), *Cope v. Anderson*, Receiver, 331 U.S. 461, and *Holberg v. Armbrecht*, 327 U. S. 392 as well as a legion of lower court cases,

> make it clear that when the Federal Legislative Act is silent as to the statute of limitations applicable to it, the limitation of the forum state is applied".

The second major principle ruled upon by the *Vanderboom* court, which principle has been well established for many years, is a statement of the basic guideline for decision making in this area:

> "The basic standard for determining which of the various local periods of limitation to utilize is that it should be one which effectuates the Federal policy at issue." (Citing *Charney v. Thomas,* 372 F. 2d 97 (6th Cir. 1967).)

No cases can be cited for the proposition that the basic standard for determining which local period of limitation to utilize is that it should be one that *defeats* the Federal policy at issue.

The decision of the Court of Appeals below, however, appears to be an exception. That decision does, indeed, permit a shipper to evade the lawful Federal tariff rate even though a local statute of limitations in Ohio is available to permit collection of the lawful Federal tariff rate and, thereby, to effectuate the Federal policy that the tariff rate shall be charged with no exceptions. The Court of Appeals below decision, therefore, provides a new and extraordinary exception to the long and well-established legal principles recited above. That decision is based on the theory that the action by the air freight forwarder is not founded upon the contract (Bill of Lading), but is founded upon the statute creating the tariffs. This subject is briefly analyzed immediately below.

Decision Below Conflicts With Settled Law That the Contract Creates the Liability, the Statutory Tariff Determines the Amount of That Liability.

Capitol Records and CMAX would not be in court but for a contractual relationship existing between them. The contract here is the bill of lading (Forwarder Airbill). The bill of lading here describes what freight CMAX is to pick up at what point and at what time and from what consignor and further describes to whom it is to be delivered. The contract also describes how much Capitol Records is going to pay for this service which is to be the tariff rate as noted on the upper left-hand corner of the bill of lading. Thus, the agreement between the parties is set forth by the contract which is the Forwarder Airbill in this case.

The Federal statute setting forth the tariff rate does not *create* a relationship between the Airfreight Forwarder and the shipper. It only provides that *if and when* the shipper is going to ship goods in interstate commerce by air transportation, he shall pay the tariff rate. Obviously the shipper selects who the airfreight forwarder is going to be and enters into a contract with that airfreight forwarder. The Federal statute fixing the tariff rate does not command that a shipper will enter into a relationship with any particular Airfreight Forwarder. The tariff rate is not a contract but is simply a measure of compensation applicable if shipment is made. *United States v. Louisville & N.R.R. Co.*, 221 F. 2d 698 (6th Cir. 1955).

Thus, it is clear that the contract between the shipper and Airfreight Forwarder *creates* the liability of a party in the event of nonperformance by that party. If CMAX failed to deliver, Capitol Records could bring an action against CMAX for its damages, which ac-

tion would be based upon liability created by this contract. In like manner, if Capitol Records failed to pay for the shipping, CMAX could bring an action against Capitol Records for that nonperformance which action is also based upon the contract.

The statute fixing the Federal tariff rate does not create a new and distinct species of legal action previously unknown to the law. It does state:

> "No air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rate, fares and charges specified in its currently effective tariffs. . . ."

If a rate at variance with the tariff is charged, then legal action in an appropriate court and based upon an appropriate legal theory will take place. The legal theory most obviously arises from contract law.

In the instant case, the parties agreed to be bound by the tariff rate as noted in the upper left-hand corner of the Forwarder Airbill (see Specimen in Appendix). It is this agreement, which is implied in every contract of carriage in any event, which forms the basis of the legal action. Like any other agreement, it is a contract which carries with it all of the rights and responsibilities of any other agreement or contract. It forms the basis of legal action.

The present lawsuit is just this situation: CMAX is seeking to recover the rate agreed upon by both parties, which is the tariff rate. The liability on the part of Capitol Records to pay for the service is created by the contract and arises from the relationship of the parties; *i.e.*, the shipper must pay the carrier for the

carrier's service when there is a contract of carriage. The liability to pay is *created* by the contract entered into between the parties; it is not created by any statute. A hypothetical example will serve to focus this point:

> "Suppose CMAX ships freight for Capital Records from California to Ohio pursuant to a Forwarder Airbill which describes all of the particulars. After the shipment has been completed and the freight arrives at its destination, Capitol Records refuses to pay for anything. Suppose further that the Forwarder Airbill sets forth a rate which is less than the tariff rate. Now CMAX sues Capitol Records to recover the charge for carrying the latter's freight. Is the obligation of Capitol Records to pay for the carriage created by statute? Hardly, for the contract of carriage created that liability. The statute merely fixes the amount which Capitol Records will pay. In short, the contract *creates* the liability, the statute merely fixes the *amount*."

It can be said without fear of contradiction that all cases in every jurisdiction hold that the prescribed tariff rules and rate regulations become a part of every contract of carriage. This must be the rule as the entire purpose of tariff regulations is to make certain that all carriers will charge the tariff rate and not give rebates, refunds, or special preference to any particular shipper. This rule is very strictly enforced and harsh penalties are imposed upon the carrier who violates this rule. Nearly every jurisdiction in the United States is replete with decisions making this obvious holding, including Ohio (*Thomas Foods, Inc. v. Pennsylvania Railroad Company*, 168 N.E. 2d 612). California (*Church v. Public Utilities Commission of California*, 51 Cal. 2d 399) and, of course, our Federal

courts (*United States v. Associated Air Transports, Inc.*, 275 F. 2d 827, a recent case concerning air freight).

As already indicated, this particular Forwarder Airbill contains language that the parties do mutually agree that the transportation shall be governed by the tariffs which ". . . are hereby incorporated into and made a part of this contract". Reference is made to the specimen attached in the Appendix.

It follows, then, that there is only one rate: the tariff rate. No other rate may be charged. Thus, those statutes setting tariffs simply *fix the amount* which must be paid by every shipper to every carrier. The *liability* to pay the carrier, however, is not created by the statute; that liability has been created by the contract. It should be noted in the recent Federal case, *United States v. Associated Air Transport, Inc.*, 275 F. 2d 827, an air carrier case, that the court therein ruled upon this precise point. It was held that the lawful rate is the rate that every carrier must exact and that which every shipper must pay, and that no act nor omission of any carrier can estop or preclude it from enforcing the full amount of the tariff charges. The court in that case adopts the identical prior decisions rendered in the railroad and truck cases on this point.

Court of Appeals' Decision Below in Direct Conflict With All Other Federal Decisions, Including by United States Supreme Court.

Fortunately, the precise issue involved here has been raised before, but not in an Air Transportation case. In the case of *Von der Ahe Van Lines, Inc. v. U.S.*, 385 F. 2d 999, 1001 (1966) cert. denied 385 U.S. 837, the exact issue was raised as it relates to highway

transportation. That was a common carrier action to recover undercharges from the shipper wherein each shipment was made pursuant to a bill of lading. The action went up on appeal from a ruling made on a motion for summary judgment. That motion was based upon a statute of limitations. Therefore, the question arose as to whether the common carrier's action was based upon the contract (bill of lading) or on some other basis. The *Von der Ahe* court ruled:

> "The Bill of Lading is the contract of carriage upon which the carrier's action is based. *St. Louis, etc. Railroad v. Starbird*, 243 U.S. 592; *Johnson Motor Transport v. U.S.*, 149 Fed. Supp. 175; *U.S. v. Louisville & Nashville Railroad*, 221 Fed. 2d 698 (6th Cir. 1955)."

The United States Supreme Court has enunciated this very basic principle as already noted in denying certiorari in the *Von der Ahe* case as well as ruling upon it in the *St. Louis, etc. Railroad v. Starbird* case cited above, and in *Mich. Central R.R. v. Mark Owen Co.*, 256 U.S. 427 and *Louisville & National Railroad v. Central Iron & Coal Co.*, 265 U.S. 59. It is interesting to note that the Court of Appeals below, for the Sixth Circuit, apparently has reversed its ruling made on this precise issue in the celebrated case of *United States v. Louisville & National Railroad*, 221 F. 2d 698 (6th Circuit 1955). The opinion of the Court of Appeals' decision below, however, makes no reference to that case. The court below, however, does cite *Carter v. American Telephone & Telegraph Company*, 355 F. 2d 486 (5th Circuit 1966) wherein it is held: "First, a tariff, required by law to be filed, is not a mere contract. It is the law". The case of *United States v. Associated Air Transport, Inc.*, 275 F. 2d 827 (5th

Circuit 1960) is cited by the Court of Appeals below to the same effect.

It should be noted, however, that these cases do *not* state that there is *no* contract. The principle enunciated is that a tariff carries the weight of law and cannot be altered by *the contract* between the parties. This is vastly different from saying that there is no contract at all. It is true that a tariff is not a mere matter of contract, for "a rate once regularly published is no longer merely the rate imposed by the carrier, but becomes the rate imposed by law." *Louisville & Nashville Railroad v. Dickerson*, 191 Fed. 705 (6th Cir. 1911).

No one argues with the fact that a contract between carrier and shipper cannot vary the tariff rate. But there is still a contract between carrier and shipper describing the particulars of the agreement. It is this contract which forms the basis and foundation of any legal action between carrier and shipper. This is the instruction provided by such cases *Von der Ahe Van Lines, Inc. v. U.S.*, (cited above), *St. Louis, etc. Railroad v. Starbird*, 243 U.S. 592; *Johnson Motor Transport v. U.S.*, 149 Fed. Supp. 175; *United States v. Louisville & Nashville Railroad*, 221 F. 2d 698; *Chicago R.I. & P.R. Co. v. Furniture Forwarders Company of St. Louis, Inc.*, 420 F. 2d 385 (1970); *Pennsylvania Railroad v. Greene*, 173 Fed. Supp. 657; *United States v. Mississippi Barge Line Co.*, 285 F. 2d 381, as well as those United States Supreme Court cases cited above.

Court of Appeals' Decision Below Exactly Contra to Prior Ruling of Same Court of Appeals.

The Court of Appeals for the Sixth Circuit has had an occasion to rule upon precisely the same issues involved in this case, previously in the celebrated case of *United States v. Louisville & Nashville Railroad Com-*

pany, 221 F. 2d 698 (6th Cir. 1955). This was a railroad rate case involving bills of lading. The court there ruled that a tariff rate itself is not a contract but is simply a measure of compensation applicable if shipment is made. The court states in this decision:

> "Each shipment was made under a bill of lading which as declared by the Supreme Court of the United States constituted the contracts. *Michigan Central Railroad vs. Mark Owen Company* 256 U.S. 427, *Louisville & Nashville Railroad v. Central Iron & Coal Company*, 265 U.S. 59. The bill of lading contains the 'entire contract' upon which the responsibilities of the parties rest. *St. Louis Iron Mountain & S. R.R. vs. Starbird*, 243 U.S. 592."

Of great importance is that the Sixth Circuit ruled in this case that the right to compensation on the part of the Railroad carrier arises not with the establishment of the rate but with the shipment.

No mention of this case is made in the instant ruling of the Court of Appeals below. Obviously, the instant decision is exactly *contra* to and overruled the *United States v. Louisville & Nashville Railroad* case. This cannot have been the intention of the Court of Appeals below since the *United States v. Louisville & Nashville* decision was based upon prior decisions by the United States Supreme Court and, of course, was consistent with rulings of all other United States Courts of Appeal.

This inconsistency calls for review and clarification by the United States Supreme Court to once again declare the law as stated in the very cases cited by the Sixth Circuit in the portion of the Opinion quoted above. There is nothing special about air transportation to call for completely different judicial interpretation than we

find with railroad, motor carrier, pipeline or water transportation cases. Precisely the same issues are involved arising out of identical fact situations. It is suggested that the Opinion of the Court of Appeals below is aberrant and inconsistent with a long line of cases decided by the United States Supreme Court as well as other Federal Courts of Appeal.

A conflict in decisions among the Federal Courts of Appeal, of course, is reason enough for the granting of certiorari *F.T.C. v. Flotill Products Co.*, 389 U.S. 179.

Court of Appeals' Ruling Below Contrary to Ohio Law.

Indeed, this is a case of first impression regarding what statute of limitations applies to actions between carriers and shippers in air transportation. Yet there are numerous cases ruling that a bill of lading is a written contract and that an action to recover undercharges is an action on a contract and that the statute of limitations governing written contracts controls, as already noted above. No mention is made by either the District Court nor the Court of Appeals below of these authorities and yet not a single case is cited for the proposition that in Ohio, or elsewhere, an action to recover undercharges on a bill of lading is not controlled by the statute of limitations for written contracts. The law of Ohio is clearly stated in *J. L. Waring & Company v. The Baltimore & Ohio Railroad Company,* 4 Ohio Dec. Rep. 553 wherein we read:

> "Though a bill of lading is silent as to the goods being delivered within a reasonable time, yet that obligation is part of written contract, and an action for failure to deliver in a reasonable time is not barred within 6 years but in 15 years".

That has been the law of Ohio for nearly 100 years up to and including the present time. The Court of Appeals below, however, has apparently decided upon a major departure, although the reasons for such a departure are not set forth.

In the absence of a Federal statute of limitations, the only statute of limitations which can apply to this situation is the Ohio statute of limitations governing written contracts. It has already been demonstrated above that this most certainly is not an action upon a statute since the contract creates the liability and the statute only fixes the amount of that liability. Both parties agree that this is not an oral agreement either express or implied. Both parties agree that the transportation performed by CMAX for Capitol Records and accepted by Capitol Records was in interstate commerce. This leaves but one conclusion: The rights and liabilities created in each of the parties through these written instruments are protected by the Ohio statute of limitations governing written contracts (Revised Code of Ohio, Section 2305.06). To hold otherwise is to hold that the parties to a written instrument such as a bill of lading or Forwarder Airbill are not afforded the same protection as given to all other parties to written contracts in Ohio.

In the alternative, to hold otherwise is to rule that an undercharge action such as this is one based upon statute, quite contrary to the overwhelming authorities and legal reasoning. Needless to say, to hold otherwise is to give to unscrupulous carriers and/or shippers a device to evade the tariff, something for which they have been searching for decades. Through the ruling of the District Court below. Capitol Records escapes paying the one and only lawful rate, the tarriff rate, even

though it entered into lawful and binding contract of carriage (Forwarder Airbill) with all terms reduced to a concise written instrument, in the state of Ohio. The illogic of such a conclusion is apparent as is the lack of justice. In short, it means that one party doing business in Ohio pursuant to a written contract may successfully avoid the obligation he contracted for, whereas the other party doing business in Ohio pursuant to that contract is precluded from having the protection of the law (the rights afforded by the 15 year statute of limitations).

Stated in a different way, the problem is that: Capitol Records has admittedly accepted all of the benefits of the written contract in Ohio (delivery is admitted in the Answer). It admits that it is qualified to do business under the laws of the State of Ohio (Answer, Second Defense) and therefore harvests all of the rights conferred by Ohio law and, of course, is subject to the obligations imposed by Ohio law. Bills of Lading (Forwarder Airbills) covered each shipment, setting forth the precise terms of the agreement in a written instrument (admitted to in the Answer). In the event of nonperformance by CMAX, Capitol Records could have enforced its contractual rights against CMAX under Ohio law, obviously. It would be afforded all of the protection and rights conferred by Ohio law. Indeed, one of those rights which it might claim would be the protection afforded by the 15 year statute of limitations.

But now the situation is reversed; having accepted all of the rights conferred by Ohio law, Capitol Records wishes to deny those same rights to CMAX, also doing business in the State of Ohio and also entitled to the same rights and privileges conferred by the laws of Ohio. The District Court and the Court of Appeal be-

low has denied these rights and privileges of Ohio law to CMAX and has permitted Capitol Records to successfully "beat the tariff" and avoid the liabilities created under the very contract whose benefits Capitol Records admittedly accepted, apparently without complaint. This is unjust, illogical, and legally untenable.

Appellant (CMAX) submits that the appropriate law of Ohio to be applied is the statute of limitations governing written contracts. If there was any doubt as to which statute should be applied, CMAX was entitled to have that doubt resolved in its favor as the resisting party in a Motion for Summary Judgment. It has been settled law for a great many years and is still the law that all doubts on an issue must be resolved against the moving party in Summary Judgment. *Potter v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464; *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620; *Electrical Fittings Corporation v. Thomas & Betts Company*, 3 Fed. 256; *Junker v. Midterra Associates, Inc.*, 49 Fed. 310. A Federal case arising in Ohio and commenting upon this same point, noting that the law of Ohio is the same, is *Arrasmith v. Pennsylvania Railroad*, 410 F. 2d 1311.

Impact on Industry.

If the decision of the Court of Appeals below is permitted to stand, it means that all parties to every bill of lading covering air transportation of goods in Interstate Commerce in the United States are no longer protected by that statute of limitations governing written contracts in the forum wherein an action is brought since there is no applicable Federal statute of limitations. This represents a complete departure from the established law in this field and utterly defeats the

Federal policy of enforcing the tariff rate as noted above.

The obvious result of the decision below is to permit a shipper to "beat" the tariff rate. As the case now stands, the Court of Appeals below has sanctioned the shipper paying a rate less than the tariff rate. This, even though carrier and shipper have reduced every single agreement to a concise written instrument and where both parties agreed that the tariff rate was the rate. Further, even though the law of Ohio provided that parties to a written instrument would be protected by the 15-year statute of limitations, CMAX and Capitol Records are not protected by the law of the land while they are transacting business in Ohio. This is patently unjust and highly discriminatory.

It seems fundamental justice that all parties to written instruments should be protected by that statute of limitations governing written instruments. Bills of lading qualify as among the most precise and detailed of written contracts—far more so than many agreements reduced to writing by laymen. There is no reason why parties to a bill of lading should be treated in any way different from parties to any other written instrument when it comes to the period of limitation within which they may bring an action founded upon that contract.

If this decision is permitted to stand, and the law of the land is thereby changed to provide that an action between a carrier and a shipper is based upon the statute fixing the tariff rather than the bill of lading, then literally thousands of carriers and shippers who previously relied upon the rights and liabilities created by such bills of lading will now be frustrated in their attempt to seek judicial relief; as one example, it is

almost universally true that state statutes of limitation governing written contracts are much longer than those controlling other types of contracts, or obligations created by statute, throughout the nation.

This being true, suddenly carriers and shippers will find themselves "out of court" because of this change in the law which is not consistent with any other aspect of transportation law such as that involved with motor carriers, rail and water transport. They will find that although they had a written contract and had relied upon the protection of that statute of limitations governing written contracts elsewhere, now through the decision of the Court of Appeals below that protection has disappeared and their action is now based upon the statute fixing the tariff with its consequently shorter period of limitation. This result could not have been intended as it creates obvious chaos in the air transportation industry and creates a situation completely at variance with other, long established transportation law.

It goes without saying that if a carrier or shipper can "beat the tariff" by no longer being exposed to that period of liability provided by those statutes of limitations governing written contracts, then literally thousands of carriers and shippers will have at long last discovered a successful way to "beat the tariff". The law is replete with innumerable methods tried over the years to evade the tariff, but the law has always been that there is only one right: the tariff rate.

A Practical Consideration.

A further practical consideration should be noted. Whereas the law in every other Federal jurisdiction is that a bill of lading is a written contract governed by the statute of limitations for written contracts, now we

have a case holding just the opposite in the State of Ohio. As far as research for both parties to this action and the District Court has been able to reveal, there is no Federal authority for the proposition that a bill of lading is not a written contract governed by the appropriate statute of limitations. Nor has research revealed a Federal case holding that actions between carriers and shippers are in fact based upon the statute fixing the tariff as opposed to being based upon the contract—bill of lading—with one exception: the ruling of the Court of Appeals below. This decision is, apparently, aberrant.

This lack of uniformity, of course, opens the door for all of those who would evade the tariff rate. Those evasive parties would be given an opportunity to shop for that forum in which they can "beat the tariff". This situation cannot be serving the clear intention of those myriad statutes establishing tariffs, and the intention of those legislative bodies which enacted those statutes. This includes the Congress of the United States in establishing the Interstate Commerce Act and in laying out the Federal policy involved here as noted above.

Conclusion.

It is highly appropriate for the United States Supreme Court to hear and determine the issues of first impression presented by this case and to resolve the obvious conflict now existing between the decision of the Court of Appeals below with other Federal Courts of Appeals as well as the United States Supreme Court and to effectuate the Federal policy of enforcing the tariff rate as laid down by the Interstate Commerce Act. If the decision of the Court of Appeals below is permitted to stand, chaos will exist in the air freight

transportation industry regarding the rights and liabilities of shippers, air carriers and air freight forwarders since written contracts (bills of lading) will no longer be afforded the protection of statutes of limitation governing all other written contracts. Further, to permit the Court of Appeals' decision below to stand will do violence to fundamental principles of contract law and the legal actions flowing therefrom, in that no longer will actions between air carriers and shippers be based upon contracts but will be based upon a Federal tariff which does not create any new species of legal action—and which Federal tariff statute was not intended to create any new species of legal action.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

THOMAS E. RUBBERT,
GOLDMAN, COLE & PUTNICK,
By THOMAS E. RUBBERT,
Attorneys for Petitioner.

APPENDIX A.

Appeal From the United States District Court for the Southern District of Ohio, Western Division.

United States Court of Appeals for the Sixth Circuit.

City Messenger Service of Hollywood, Inc., dba City Messenger Air Express and/or C.M.A.X., Plaintiffs-Appellants, v. Capitol Records Distributing Corp., Defendant-Appellee. No. 71-1012.

Decided and Filed August 12, 1971.

Before: Phillips, Chief Judge, Brooks and Kent, Circuit Judges.

Per Curiam. This is an appeal from an order of dismissal by the District Court. The facts are sufficiently set forth in the opinion of District Judge Timothy Hogan, ... F.Supp. ....., S.D. Ohio, 1971. The parties will be decribed as in the District Court.

Briefly, the facts are as follows: The plaintiff is an "air carrier" within the meaning of Title 49 U.S.C. § 1301(3), and as such was required to charge the freight rate "specified in its currently effective tariffs." 49 U.S.C. § 1373(b). More than 3700 shipments were made during the period involved, which began in February, 1955 and ended in January, 1959. The last shipment was made more than six years before the commencement of this action in the District Court. Plaintiff brought the action to recover for the difference between the tariff prescribed on the bill of lading and the specified tariffs in effect at the time of the shipments. Defendant filed a motion for summary judgment on the ground that the action was barred by the applicable statute of limitations of the State of Ohio. The

trial court granted the motion after concluding that the right to recover was a liability created by statute, and, therefore, barred by the provisions of *Ohio Revised Code* §2305.07. "An action * * * upon a liability created by statute * * * shall be brought within six years after the cause thereof accrued."

The basic issue in this case is whether the action is based upon a written contract as claimed by the plaintiff and, therefore, controlled by the 15-year statute of limitations contained in *Ohio Revised Code* §2305.06, or whether the action is based upon a statutory liability and therefore covered by the six-year statute of limitations of Ohio upon which the trial court relied. The Court of Appeals for the Fifth Circuit has had occasion to determine whether a charge for air freight is based on contract or is required by law. In *United States v. Associated Air Transport, Inc.*, 275 F.2d 827, 832, (5th Cir., 1960), that Court said:

> Filed as it was under compulsion of §403(a) of the Civil Aeronautics Act of 1938, the tariff carried the statutory mandate of §403(b) that it and it alone was to be the sole standard for services to be rendered and charges assessed and collected.[14] In the implementation of this stringent legislative policy, the courts have been equally emphatic that the basis for the charge or credit must be found in the tariff. If it is not in the tariff, it is not allowable. It is not a mere matter of contract. For "a rate once regularly published is no longer merely the rate imposed by the carrier, but becomes the rate imposed by law." Louisville & N. R. Co. v. Dickerson, 6 Cir., 1911, 191 F. 705, 709. "Such tariffs, at least those which are factors in determining the carrier's charges,

> have the force and effect of statutes." American Ry. Express Co. v. American Trust Co., 7 Cir., 1931, 47 F.2d 16, 18. The tariffs are both conclusive and exclusive; they may not be added to through reference to outside contracts or agreements or understandings or promises.[15]

And in *Carter v. American Telephone & Telegraph Company*, 365 F.2d 486 (5th Cir., 1966), the Court said further at page 496:

> "First, a tariff, required by law to be filed, is not a mere contract. It is the law."

In this case we agree with the District Court that the plaintiff is not suing for freight charges described in written contracts, but is suing for the statutory undercharges represented by the differences between the charges set forth in the bills of lading and the amounts prescribed by the specified tariff required by law to be filed.

For the reasons herein stated and for the reasons stated by District Judge Hogan in his opinion, ... F.Supp. ....., (S.D. Ohio, 1971), the judgment of the District Court is affirmed.

APPENDIX B.

Summary Judgment in Favor of Defendant.

United States District Court for the Southern District of Ohio, Western Division.

City Messenger Service of Hollywood, Inc., dba City Messenger Air Express and/or C.M.A.X., Plaintiff, v. Capitol Records Distributing Corp., Defendant. Civil Action No. 6659.

Filed Oct. 29, 1970.

The plaintiff, at the times of interest in this case, was a "air carrier" as that term is used in Ch. 20 of 49 U.S.C. As such, it had filed with the "Board" tariffs applicable to various of its carriages. Having done so, it was subject to 49 U.S.C. §1373 and specifically (b) of that section, which provides:

> "No air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares and charges specified in its currently effective tariffs * * *."

Section 1472(d) of Title 49 makes it a criminal offense for any air carrier or ticket agent or employee or representative thereof to willfully grant or give, or cause to be offered, granted, or given any rebate or other concession in violation of the provisions of the Act, and specifically makes it a criminal offense for any such person to suffer or permit any shipper to obtain transportation or services at less than the published tariff rates. For some period of time prior to 1959—ending at a time more than six years before the commencement of this action—the defendant made

some three thousand shipments at least via the plaintiff's air carrier services. Each of these shipments were represented or covered by an "air bill." This is a written instrument which corresponds to a railroad bill of lading. For our purposes we may assume that each air bill was actually signed by both the shipper, the defendant, and also by the air carrier, the plaintiff. Each air bill contained a blank for the insertion of the charge for the service. Apparently the charge was actually inserted in the air bill after the shipper had signed it—in our view, it makes no difference whether the insertion was after or before, since that was the practice of the parties anyway. In any event, in each of the some three thousand shipments, the actual charges inserted in the air bill were less than the tariff rates—that is, less than the applicable rates on the published and filed tariffs of the plaintiff. The defendant paid only what it was charged, of course, and the purpose of this action is to recover the undercharge in accordance with the requirements of the above statutes.

For jurisdictional purposes—there is no problem of the requisite amount. The parties are each residents or citizens of California, so there is no diversity jurisdiction, of course. Early in this controversy the defendant objected to the subject matter jurisdiction on the ground that no federal question was involved. The plaintiff at that time resisted the objection to jurisdiction and based its resistance on 28 U.S.C. §1337, which, of course, provides:

> "The district court shall have jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce * * *."

That, of course, is the equivalent of claiming that this action arises under a federal statute.

There is no issue of fact at all on this point—every service rendered by the plaintiff to the defendant involved in this controversy was rendered more than six years before this case was filed in February of 1968. Every "air bill" involved was signed and delivered more than six years before that date and every statement covering all the transactions involved in this case found some issue prior to the six-year period.

Concededly the plaintiff's cause or causes of action arose more than six years prior to the commencement of this action. The defendant has moved for a summary judgment on the ground that the plaintiff's action is barred by the statute of limitations.

The question is novel. While Congress has provided statutes of limitation governing actions by licensed or permitted freight forwarders or against them (49 U.S.C. §1006(a)—two or three years as the case may be) and while Congress has provided a statute of limitations for such actions involving railroad common carriers and water common carriers (49 U.S.C. §16—three years) Congress has provided no statute of limitations applicable to an action by or against an air carrier to recover undercharges or the opposite.

The duty of a district court in this circuit in the face of a plea of the statute of limitations is set forth in *Valdecker v. Corn Products*, 411 F.2d 850 (1969). We need not repeat it.

The applicable rule of generality is set forth in *Auto Workers v. Hoosier Corp.*, 383 U.S. 696 (1965) at 705, as follows:

> "Accordingly since no federal provision governs, we hold that the timeliness of a * * * suit is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations."

There are three Ohio statutes of limitation of possible application. Revised Code Section 2305.06 provides:

> "An action upon a specialty or an agreement, contract, or promise in writing shall be brought within 15 years after the cause thereof accrued."

The plaintiff claims that this is the applicable statute —relying on numerous cases which refer to a bill of lading or to an air bill as a "contract in writing" between the parties.

Section 2305.07 of the Revised Code of Ohio provides:

> "An action upon a contract not in writing, express or implied, or upon a liability created by statute, other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

The defendant claims that this is the applicable Ohio statute. The claim has two bases. First, periodically the plaintiff would tally up the charges and render the defendant a cumulative bill, which leads the defendant to the contention that this is an action on an account. An action on an account clearly in Ohio is subject to the six year statute. The second basis rests on the Mahoning County Court of Appeals case of *Rudolph v. Husat*, 187 N.E.2d 190 (1961)—in that case, the court said:

> "In order for an action to come within statutes of limitation governing actions upon a speciality or

> agreement, contract or promise in writing, the action must grow out of a written instrument which acknowledges indebtedness or promises to [illegible] in such terms as to make supplemental evidence unnecessary."

The defendant points to the necessity of the tariffs as supplemental evidence in this case.

The third statute is Section 2305.13 of the Ohio Revised Code. This statute provides as follows:

> "All actions by carriers for recovery of their charges or part thereof, arising out of the intrastate transportation of persons or property in this state * * * shall be begun within three years of the time the cause of action accrues * * * The cause of action in respect of a shipment of property shall accrue upon the delivery thereof by the carrier. Overcharge as used in this section means charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Public Utilities Commission."

It is the conclusion of this Court that the "appropriate state statute of limitations" to refer to "as a matter of federal law" is either the six-year or the three-year statute for these reasons:

First—This actually is not an action on a contract. The price stated in the contract is not what the plaintiff seeks to recover—it is the difference between a tariff price and the price contracted for. But for the federal statutes referred to above, the contract would have been a perfectly valid one. The statute is as necessary a basis for the plaintiff's cause of action as it is for the jurisdiction of this Court. The Fifth Circuit has aptly said in a case involving an air carrier—

> "Such tariffs, at least those which are factors in determining the carrier's charges, have the force and effect of statutes." *United States v. Associated Air Transport*, 275 F.2d 827 (1960) at pg. 833.

Essentially the foundation of the plaintiff's claim is or are the undercharge sections of the federal statutes which have been referred to hereinabove. Essentially this is an action on a "statute" and for that reason the Ohio six-year statute would apply.

Secondly, in the search for the "appropriate state statute" the question is ever present—is the search for literacy or is the search for the substantive. Ohio has clearly expressed itself on the time within which any carrier should be able to sue to recover an undercharge. True it is the expression was directed to "intrastate" Shipment. For good reason—Ohio's right or power to directly limit in haec verbae, the time within which one could exercise a federal right would be of dubious validity. We think the search is for the substantive without regard to technical literacy. See *Vanderboom v. Sexton*, 422 F.2d 1233 (1970), in which the Court said:

> "The basic standard for determining which of the various local periods of limitation to utilize is that it should be one which effectuates the federal policy at issue." Citing *Charney v. Thomas*, 372 F.2d 97 (6th Cr. 1967).

See also *Englander v. Ford Motor Co.*, 293 F.2d 802 (6th Cir. 1961); *Reliford v. Eastern Coal*, 260 F.2d 477 (6th Cir. 1958); *Charney v. Thomas*, 372 F.2d 97 (6th Cir. 1967); *Mulligan v. Schlachter*, 389 F.2d 231 (6th Cir. 1968); *Crawford v. Zeitler*, 326 F.2d

119 (6th Cir. 1964). Furthermore, as the Supreme Court pointed out in *Auto Workers*, in determining the applicable state statute (whether the long or short period of limitations should be described as the one most effectuating federal policy; it is quite in order to look to the federal statutory regulation in the general field. As we have seen, the applicable limitation periods provided by Congress in related fields, such as water shippers or land shippers, is a short two- or three-year period.

The fifteen-year section is not the most "appropriate" section. Either the six-year section or the three-year section is. It is not necessary in this case to decide which and we do refrain from so deciding.

The amended complaint will be and it hereby is dismissed at the plaintiff's cost.

/s/ Timothy Morgan
United States District Judge.

APPENDIX C.

IMPORTANT { YOU ARE MAKING THE ORIGINAL AND 6 CARBON COPIES
BEAR DOWN AND PRINT ALL CHARACTERS.

CHAX

Trans-Pacific Air Freight

NON NEGOTIABLE

STAR SPECIAL ☐

DATE

CHAX No. 65471

TO

CITY CHARGES

COUNTY (CHECK ONE)

PREPAID ☒

STATE COLLECT ☐

DESCRIPTION	NO. PCS.	WEIGHT	RATE	PREPAID CHARGES	COLLECT CHARGES
			WEIGHT RATE CHARGES		
			ADVANCES		
			DECLARED VALUE TRANS. CHARGES		
			TOTAL		
			C.O.D.	XX	XX
			C.O.D. FEE		
			Total Charges		

THIS IS YOUR INVOICE - NO STATEMENT WILL BE SENT